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In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD M. WOOD, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction under 12 U.S.C. 1819 (Fourth) over this suit to which the Federal Deposit Insurance Corporation (FDIC) is a party in its corporate capacity.

2. Whether the FDIC, when it purchases assets from the receiver of an insolvent bank pursuant to 12 U.S.C. 1823 in order to facilitate a purchase and assumption transaction with another insured bank, is shielded from a defense of usury arising under state law that would not prevail against a holder in due course.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 758 F.2d 156. The opinion of the district court (Pet. App. 14-19) is reported at 578 F. Supp. 144.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1985, and the petition for a writ of certiorari was filed on June 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arose out of the efforts of the Federal Deposit Insurance Corporation (FDIC) to collect on a note, guaranteed by petitioner, that the FDIC acquired as the result of the failure of a bank of which petitioner was a director and major shareholder.

1. The FDIC is a federal agency charged with " 'bringing to depositors sound, effective, and uninterrupted operation of the banking system with resulting safety and liquidity of bank deposits' "(Pet. App. 9, quoting H.R. Rep. 2564, 81st Cong., 2d Sess. 3 (1950)). To that end, the FDIC insures bank deposits. One of the FDIC's most critical functions arises in connection with the failure of an FDIC-insured bank. When such a bank is closed by its chartering authority, the FDIC must act quickly to meet its statutorily mandated responsibility of protecting depositors and preserving public confidence. One option is for the FDIC simply to pay the depositors their insured amounts. See 12 U.S.C. 1821(f). In that event, the failed bank's receiver (usually the FDIC itself, acting in a separate capacity) then liquidates the assets of the bank and distributes the proceeds to the bank's creditors, including uninsured depositors.[1] This option, which is sometimes referred to as a "deposit payoff," has several disadvantages, not the least of which is that public confidence in the banking system may be severely undermined because of the disruption of service. These consequences undermine the FDIC's goal of assuring uninterrupted operations and liquidity of deposits. Pet. App. 9-10.[2]

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[1]In most cases, the FDIC is appointed as receiver of the failed bank by the appropriate banking authority. The FDIC is required by statute to accept such an appointment if tendered. 12 U.S.C. 1821(c) and (e). As a result, in almost all cases in which a bank fails, the FDIC acts in two separate capacities: in its corporate capacity as insurer of deposits, and as the receiver of the failed bank. 12 U.S.C. 1823(d) and (e). See Pet. App. 2.

[2]Under the "deposit payoff" alternative, all banking services are abruptly interrupted; time, demand, and savings deposits are frozen; and all checks drawn on the closed bank's accounts are returned unpaid. Bank depositors are left without access to their funds on deposit during the time it takes the FDIC to determine the amount of deposit insurance owed to each depositor and to prepare for payment. Moreover, depositors who have deposits exceeding the $100,000 insurance coverage (12

The FDIC has an alternative method of addressing the problems presented by a bank failure that avoids the disadvantages of a deposit payoff. This method is known as the "purchase and assumption transaction." Pursuant to the authority conferred on it by Congress under 12 U.S.C. 1823(c)(2)(A), the FDIC, in its corporate capacity, may purchase assets of a failed insured bank in order to facilitate the purchase of certain other assets and the assumption of all deposit liabilities of the failed bank by another insured bank (referred to as the "assuming bank"). Generally, the assuming bank reopens the doors of the failed bank on the next business day, thereby preventing any loss or inconvenience to depositors and any interruption of vital banking services. In addition, the failed bank's receiver is able to realize some benefit from a valuable asset of the bank that otherwise would be lost: the premium paid by the assuming bank for the "going concern" value of the bank.

The detailed mechanics of a purchase and assumption transaction have been described by the court below (Pet. App. 2) and other courts. See *Gunter* v. *Hutcheson*, 674 F.2d 862, 865-866 (11th Cir.), cert. denied, 459 U.S. 826 (1982); *In re F & T Contractors, Inc.*, 718 F.2d 171, 174 (6th Cir. 1983). Briefly, a purchase and assumption transaction requires the assuming bank to purchase only those assets of the failed bank that are believed to be of the highest banking quality. As a result, the amount of deposit liabilities that bank assumes is greater than the value of the assets it purchases. The receiver of the failed bank therefore agrees to pay in cash to the assuming bank an amount sufficient to cause the assets it purchases to be equal in amount to the

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U.S.C. 1821(a)) and other creditors must await the payment of dividends from the receiver's liquidation of the bank's assets. The liquidation proceedings often take years, and creditors may never recover the full amount of their claims. See Pet. App. 9-11.

liabilities it assumes, less a credit for the premium paid by the assuming bank for the "going concern" value of the failed bank. Payment of these funds by the receiver is made possible by the FDIC, acting in its separate corporate capacity. The FDIC purchases from the receiver all remaining assets of the failed bank that were not acquired by the assuming bank. As consideration, the FDIC pays cash from its Permanent Insurance Fund (12 U.S.C. 1817) to the receiver in an amount equal to the difference between the value of the failed bank's assets acquired by the assuming bank and the amount of deposit liabilities it assumed, less an amount equal to the premium paid by the assuming bank for the "going concern" value of the failed bank. 12 U.S.C. 1823(c)(2)(A). To minimize the resulting loss to the Permanent Insurance Fund, the FDIC then attempts to collect on the assets it has acquired from the receiver.

It is imperative that the FDIC consummate the purchase and assumption transaction as quickly as possible in order to provide protection for depositors, to lessen the potential adverse impact of a bank failure on the community and the public in general, and to capture the "going concern" value of the bank as an asset. See generally Pet. App. 9-10. However, in authorizing the implementation of these transactions as the preferred method for minimizing the adverse consequences of a bank failure, Congress at the same time sought to assure protection for the FDIC's Permanent Insurance Fund. Accordingly, Congress provided that the FDIC may facilitate a purchase and assumption transaction only if the cost to the Fund would be less than that of a liquidation and deposit payoff. 12 U.S.C. 1823(c)(4)(A). As a practical matter, this determination, sometimes referred to as the "cost test," must be made immediately upon a bank's failure if the FDIC is to consider the purchase and assumption transaction alternative at all. Pet. App. 9-10.

2.a. Petitioner was a major shareholder in the Community Bank of Washtenaw in Ypsilanti, Michigan (Community Bank) and served as one of its directors and as its attorney. Petitioner had agreed to purchase the interest of Peter Stone in a company called Thought Publications, Inc (TPI). The company owed Stone unpaid salary totalling $12,000, but had insufficient funds to pay the debt. As part of the purchase transaction, petitioner arranged for a loan of $12,000 to be made by the Community Bank to Stone and Carole Barnett (formerly Carole Stone). Petitioner guaranteed the loan and assured the Stones that he would be solely responsible for payment of the principal, out of the profits of TPI. Pet. App. 2-3, 15; 10-20-83 Tr. 13, 18-19; 10-23-83 Tr. 23.

On May 15, 1982, Community Bank was declared insolvent, and the FDIC was appointed as its receiver. On the same day, the FDIC, as receiver, solicited bids from other insured banks in an attempt to effect a purchase and assumption transaction. The highest acceptable bid was submitted by Michigan National Bank of Ann Arbor, which agreed to assume the deposit liabilities, to purchase certain assets of Community Bank, and to reopen the Community Bank's offices under the name of the Ann Arbor Bank. In order to facilitate the transaction, the FDIC, in its corporate capacity, purchased from the receiver the Community Bank assets that the Ann Arbor Bank did not acquire. Pet. App. 2, 15.

The note executed by Stone and Barnett was among the assets purchased by the FDIC. Community Bank, represented by petitioner, previously had filed suit in state court against Stone and Barnett to collect the balance of the principal and accrued interest on the note, which was allegedly in default. Pet. App. 14. On November 6, 1982, the FDIC, as holder of the note and of petitioner's guaranty, was substituted in its corporate capacity for Community

Bank as the plaintiff in the suit. Petitioner was then added as a defendant. The FDIC subsequently removed the action to the United States District Court for the Eastern District of Michigan pursuant to 12 U.S.C. 1819 Fourth and 28 U.S.C. 1345. As a defense to the amended complaint, petitioner, Stone and Barnett asserted that the loan was usurious under Michigan law because it bore an interest rate of 15.21%. Michigan law provides in general that a loan made by a bank to an individual at an interest rate of more than 7% is usurious unless the individual furnishes a sworn statement that the loan is for a business purpose. Mich. Comp. Laws. Ann. §§ 438.31, 438.61 (1978). Michigan law further provides that as a penalty, a lender who enters into a note that does not comply with the usury law is barred from recovering *any* interest on the note and is liable to the borrower for attorney fees and court costs. *Id.* § 438.32. However, Michigan law provides that a holder in due course is entitled to collect on the note as if usury had not been alleged and proved. *Id.* § 438.5; See Pet. App. 26-28.

The case was tried to a jury, which found that all defendants were liable on the note, but that the note was not made for a business purpose (Pet. App. 22-25). Petitioner and the other defendants then moved to collect attorney fees and court costs from the FDIC under the Michigan usury law, in addition to the disallowance of interest, and the FDIC moved for judgment notwithstanding the verdict on the usury issue (*id.* at 15). The district court granted the FDIC's motion, permitting the FDIC to collect the interest on the note as well as the principal. The court held that when the FDIC acquires a note in a purchase and assumption transaction, it enjoys a status equivalent to that of a holder in due course if it does not have actual knowledge that the note was given at a usurious rate. Applying that rule to the facts of this case, the court found that the FDIC did not have

actual knowledge that the note was given at a usurious rate, and it concluded that the FDIC therefore was not subject to the usury defense raised by the defendants. The district court accordingly also denied the motion of petitioner and the other defendants to recover attorney fees and costs from the FDIC. Pet. App. 14-19.

b. Although petitioner did not contest his liability for the principal amount, he appealed the district court's rejection of the usury defense and its resulting allowance of interest.[3] The court of appeals affirmed (Pet. App. 1-13). Following the analysis set forth by this Court in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the court of appeals held that when the FDIC, acting in its corporate capacity and in the course of a purchase and assumption transaction, acquires a note in good faith, for value, and without actual knowledge of any defense against the note, federal common law shields the FDIC from a usury defense that would not prevail against a holder in due course (Pet. App. 1-12). The court of appeals also held, as it previously has done in *Gilman* v. *FDIC*, 660 F.2d 688 (6th Cir. 1981), that the FDIC is not under a duty, in either of its capacities, actually to examine the records of a failed bank before it agrees to execute a purchase and assumption transaction, and that it therefore cannot be charged with knowledge of a defense merely because that information could be obtained by searching through a failed bank's files (Pet. App. 12-13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court therefore is not warranted.

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[3]Stone and Barnett did not appeal the award of interest.

1. Petitioner first contends (Pet. 9-13) that the federal courts have no "subject matter jurisdiction" in this case. It does not appear, however, that petitioner intends this objection to be taken literally, because petitioner states (Pet. 11) that he does not question the right of the FDIC under 12 U.S.C. 1819 to remove the case to federal district court for determination. Petitioner is clearly correct in this concession.

Section 1819 Fourth provides in relevant part:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party *shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy*; * * * except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

Under this provision, the federal courts lack jurisdiction only when the FDIC is a party to a suit as receiver of a state bank and the suit involves only the rights or obligations of depositors, creditors, stockholders and the bank under state law. *FDIC* v. *Sumner Financial Corp.*, 602 F.2d 670, 677-679 (5th Cir. 1979); *FDIC* v. *Godshall*, 558 F.2d 220 (4th Cir. 1977). But, where the FDIC, in its separate corporate capacity, is asserting its own rights to realize on assets — such as the note and guaranty at issue in this case — Section 1819 expressly confers jurisdiction on the federal district courts to entertain the suit. *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 455 (1942); *FDIC* v. *Ashley*, 585 F.2d 157 (6th Cir. 1978); *FDIC* v. *Sumner Financial Corp.*, 602 F.2d 670 (5th Cir. 1979); *FDIC* v. *de Jesus Valez*, 678

F.2d 371 (1st Cir. 1982); *In re F & T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983).[4] The district court therefore clearly had subject matter jurisdiction in this case.

2. Petitioner's contention that the federal courts lack subject matter jurisdiction apparently is intended to be but another way of arguing that this case should be governed by state rather than federal law and that petitioner therefore should not be liable for interest on the note because it was usurious under state law. See Pet. 10. It is clear, however, that federal law governs this lawsuit. There can be no doubt that the FDIC derives its authority from a specific Act of Congress in the exercise of a "constitutional function or power," and that the overriding federal interests in the FDIC's exercise of its statutory responsibilities in administering a nationwide federal program warrant the protection of federal law. See *United States* v. *Kimbell Foods*, 440 U.S. 715, 726-727 (1979); *United States* v. *Yazell*, 382 U.S. 341, 354 (1966); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). Indeed, as the court of appeals recognized (Pet. App. 6), this Court already has specifically held that federal law governs in a suit by the FDIC to recover on a note. See *D'Oench, Duhme*, 315 U.S. at 456.

3. The remaining question, then, is what the content of federal law should be in the circumstances of this case — *i.e.*, whether state law should be adopted as federal law, or whether a separate federal rule should be fashioned. Under Michigan law, a usurious note is not void, and the lender is entitled to recover the principal; however, as a penalty for entering into the agreement, the lender is barred from recovering interest, and attorney fees and costs may be assessed against him. Mich. Comp. Laws. Ann. § 438.32

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[4]Federal jurisdiction is also available under 28 U.S.C. 1345, because the FDIC is an agency of the United States that was expressly authorized by Congress under 12 U.S.C. 1819 to bring this suit.

(1978). See *FDIC* v. *Leach*, No. 82-1003 (6th Cir. Sept. 11, 1985), slip op. 5 n.1; *Osinski* v. *Yowell*, 135 Mich. App. 279, 286-288, 354 N.W. 2d 318, 322 (1984); *Bebee* v. *Grettenberger*, 82 Mich. App. 416, 422-423, 266 N.W. 2d 829, 832 (Ct. App. 1978). However, if the note passes to a person who takes the note in good faith for valuable consideration before it becomes due, and without actual notice that it was given upon a usurious consideration, that person is entitled to recover on the note to the same extent as if no usury defense had been raised. Mich. Comp. Laws Ann. § 438.5 (1978). The latter provision in effect applies the doctrine of holder in due course in the context of usury. The court of appeals assumed without deciding that the FDIC was not a holder in due course as a matter of state law for purposes of avoiding the state-law usury penalty (Pet. App. 4-5).[5] But the court of appeals concluded that the usury penalty should not be applied against the FDIC where it acted in good faith and without actual knowledge that the note was usurious. This conclusion was correct, particularly in the circumstances of this case.

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[5]Petitioner asserts (Pet. 13) that both courts below ruled that the FDIC is not a holder in due course under the Uniform Commercial Code, as embodied in Mich. Comp. Laws Ann. § 440.3302 (1967). It is true that the district court so stated (albeit without specifying what requirement of holder in due course status the FDIC does not satisfy (see Pet. App. 17-18)), but the court of appeals expressly did *not* decide that question (see Pet. App. 4-5).

Separate provisions of Michigan law concerning commercial paper provide that a person does not become a holder in due course of an instrument "by purchasing it as part of a bulk transaction not in the regular course of business of the transferor." Mich. Comp. Laws Ann. § 440.3302(3)(c) (1967); Pet. App. 29. Petitioner contends (Pet. 14-16) that this limitation applies under Michigan's usury laws as well and that the FDIC could not be a holder in due course — and therefore could not overcome petitioner's defense of usury — because the FDIC acquired the note at issue here as part of a bulk transaction following the failure of the Community Bank. However, as the court of appeals observed (Pet. App. 6), it does not appear that the "bulk transaction" limitation applies to the provision for overcoming the usury defense under Mich.

In *Kimbell Foods*, the Court observed that whether to adopt state law in a particular instance or to fashion a separate federal rule is "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." 440 U.S. at 728, quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 310 (1947). The Court identified three such considerations in *Kimbell Foods*: whether there is a need for a nationally uniform body of law, whether application of state law would frustrate specific objectives of the federal program, and the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 728-729. These factors all counsel against application of the state law usury penalty against the FDIC.

a. First, the very nature of the statutory program for promoting stability and confidence in the Nation's banking system furnishes a compelling reason for a uniform federal rule protecting the FDIC's status as a holder of assets that it acquired in good faith and without actual knowledge of a defect under state law. The Court recognized this reality in *D'Oench, Duhme*. There the Court held that a uniform federal rule, rather than state-law holder-in-due-course principles, should be applied to protect the FDIC from undisclosed side agreements that would otherwise defeat the FDIC's interest in notes it acquired from a failed bank. The Court ruled that such arrangements are inconsistent with the policy of the federal statute under which the FDIC operates. 315 U.S. at 455, 459-462.

Comp Laws. Ann. § 438.5 (1978). That exception is not mentioned in Section 438.5, even though that Section does list other conditions commonly associated with holder in due course status. The omission therefore appears to be deliberate.

The Court's subsequent decisions have adhered to this view of the protections that must be afforded the FDIC. In *Kimbell Foods*, the Court, quoting its prior decision in *United States* v. *Yazell*, 382 U.S. 341, 354 (1966), observed that "federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules." 440 U.S. at 728. In *Yazell*, one of the examples the Court cited for the proposition quoted in *Kimbell Foods* was the uniform federal rule fashioned for the protection of the FDIC in *D'Oench, Duhme*. The *Yazell* Court observed that "[t]he bank deposit insurance program is general and standardized," and "[i]n all relevant aspects, the terms are explicitly dictated by federal law." 382 U.S. at 354, citing the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq*. Similarly, in *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), upon which the Court also relied in *Kimbell Foods* (see 440 U.S. at 728), the Court again cited *D'Oench, Duhme* as an example of a situation in which the Court had fashioned federal common law because "there [was] an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism" (406 U.S. at 105 n.6).[6] The court of appeals properly adhered to this view here. See also *Gunter* v. *Hutcheson*, 674 F.2d at 869-870.

b. Second, aside from the overriding need for uniformity under the FDIC insurance program as a general matter, application to the FDIC of penalties under the state law of usury, even where the FDIC acquires assets in good faith and without actual knowledge, "would frustrate specific

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[6]The Court's subsequent decision in *Milwaukee* v. *Illinios*, 451 U.S. 304 (1981), did not question either the correctness of its decision in *Illinois* v. *Milwaukee* under then-exsisting laws or, in particular, the Court's approval in the latter decision of *D'Oench, Duhme* as an appropriate occasion for the fashioning of a federal common law rule. See 451 U.S. at 314; *id.* at 336 (Blackmun, J., dissenting).

objectives of the federal program[]" (*Kimbell Foods*, 440 U.S. at 728). As we have explained above, one of the most effective ways in which the FDIC can fulfill its statutory responsibilities is to arrange a purchase and assumption transaction, in lieu of the less favorable alternative of paying insured deposits and liquidating the failed bank's assets. However, the FDIC is authorized to enter into a purchase and assumption transaction only when it determines the transaction will cost less than the cost of a "deposit payoff." It would be impossible for the FDIC to estimate with reasonable accuracy its potential loss from a purchase and assumption transaction within the limited time available if the FDIC were to be subject to potential state law claims of usury of which it lacks knowledge. Moreover, a purchase and assumption transaction must be consummated with extraordinary speed if any "going concern" value of the failed bank is to be retained and public confidence maintained; requiring the FDIC to conduct a detailed examination of the bank's files and to consider the value of each of its assets in light of the potential state law defenses and penalties would substantially impair the FDIC's ability to act with the necessary dispatch. The result urged by petitioner therefore would hinder the implementation of purchase and assumption transactions, which afford an essential means of addressing the problems created by a failed bank in a way that minimizes the disruptions of the banking system and protects the resources of the insurance fund that affords protection for depositors generally. See Pet. App. 7-11.

By the same token, the FDIC, unlike an ordinary assignee who acquires an interest through a voluntary, arms-length transaction, is not a "voluntary" creditor in any meaningful sense of the term when it acquires assets pursuant to a purchase and assumption transaction. In *Kimbell Foods*, the term "voluntary creditor" was applied to federal

agencies that were involved in a lending transaction from its inception, were able to tailor the transaction in light of applicable state law, and were thus able to control the factors that made collection of an obligation likely. See 440 U.S. at 732-733, 734-736. When the FDIC is faced with the liquidation of the assets of a failed bank, it does not have any of these opportunities. Moreover, the FDIC-administered insurance program is not a form of "social welfare legislation" primarily designed for the benefit of particular private persons (see *Kimbell Foods*, 440 U.S. at 735); it benefits the banking system and the Nation as a whole by assuring stability of institutions that are essential for the conduct of commerce.

We note as well that the effect of applying state law in full force in these circumstances would be to prohibit the FDIC from recovering any interest, not merely an amount in excess of the ceiling under state law, and to expose the FDIC to payment of attorney fees and costs as well. The result would be to invoke against an agency of the United States what state law itself designates as a "penalty" — a consequence that ordinarily is barred absent express congressional consent. *FDIC* v. *Tito Castro Construction, Inc.*, 548 F. Supp. 1224 (D. P.R. 1982), aff'd on other grounds, 741 F.2d 475 (1st Cir. 1984); *In re Charter Executive Center, Ltd.*, 34 Bankr. 131 (M.D. Fla. 1983). See *Missouri Pac. Ry.* v. *Ault*, 256 U.S. 554 (1921).

c. Third, taking account of possible countervailing considerations, the federal rule applied by the court of appeals does not disrupt commercial relations predicated on state law. It is doubtful that the potentiality of a bank failure plays a role in the ordinary commercial expectations of the parties. *Gunter* v. *Hutcheson*, 674 F.2d at 872. Moreover, under the court of appeals' decision, the FDIC is simply placed in the same position as a holder in due course who, even under Michigan law, is not subject to the defense of

usury and the resulting penalty. As a result, petitioner's position is no worse than he would have been in had the Community Bank transferred the note to another banking institution in the ordinary course of business. The prospect that a note might be transferred to a holder in due course in that manner is far more likely to have been within the commercial expectations of the parties than is the potential that the lending bank might fail at a time when the note remained in its portfolio. For these reasons, the need to avoid interference with the federal statutory policy of promoting stability and confidence in the Nation's banking system far outweighs the remote possibility that commercial expectations founded in the Michigan law of usury might be affected by a federal rule protecting the FDIC against state law usury claims in circumstances such as these. Compare *Kimbell Foods*, 440 U.S. at 739-740.

d. Other federal courts likewise have held that a debtor cannot invoke state usury penalties to reap a windfall forfeiture of a debt that came into the possession of the FDIC through a purchase and assumption transaction. See *FDIC* v. *Tito Castro Construction Co.*, 548 F. Supp. 1224 (D.P.R. 1982), aff'd on other grounds, 741 F.2d 475 (1st Cir. 1984); *In re Charter Executive Center Ltd.*, 34 Bankr. 131, 135 (M.D. Fla. 1983); *FDIC* v. *Rood*, No. 82-1245-CIV-TGC (M.D. Fla. Nov. 18, 1983). See also *FDIC* v. *Leach*, No. 82-1003 (6th Cir. Sept. 11, 1985), slip op. 5-8. Applying similar principles, the FDIC also has been accorded protection against certain other state law defenses. See *Gunter* v. *Hutcheson*, 674 F.2d at 873; *Gilman* v. *FDIC*, 660 F.2d 688, 695 (6th Cir. 1981); *FDIC* v. *Hatmaker*, 756 F.2d 34, 38 (6th Cir. 1985); *FDIC* v. *Leach*, slip op. 8-10. In view of the consistent treatment of these issues by the lower federal courts, there is no occasion for review by this Court.

Moreover, the Court of Appeals of Michigan also has recently held that the FDIC is not subject to the defense of usury under Michigan law in a suit brought by the FDIC in its corporate capacity. *FDIC* v. *Garbutt*, 370 N.W.2d 387, 391-392 (Mich. App. 1985). In so holding, the court relied on *D'Oench, Duhme* and the district court decisions in the instant case and *FDIC* v. *Leach, supra*, and it recognized the "strong policy concerns implicated in a purchase and assumption transaction" and the need "to facilitate the congressional intent to protect the FDIC and the public funds it administers" by according it a status similar to that of a holder in due course. 370 N.W.2d at 392. Thus, the Michigan Court of Appeals and the federal courts are in agreement regarding the proper application of federal law and Michigan law in this precise context.

e. The application of a federal rule to preclude petitioner from invoking the penalty features of Michigan's usury law is particularly appropriate in this case. Petitioner was a director and principal shareholder of Community Bank and was instrumental in arranging the loan by Community Bank as part of a broader transaction for his personal benefit. It would be inequitable indeed if petitioner, at the expense of the Permanent Insurance Fund, now were permitted to avoid liability for the interest on the note he arranged and guaranteed. Cf. 12 U.S.C. 1828(j)(2). Compare *Eiberger* v. *West*, 247 Ga. 767, 281 S.E. 2d 148 (1981); *Miro* v. *Allied Finance Corp.*, 650 S.W.2d 938 (Tex. Civ. App. 1983); *Cohn* v. *Receivables Finance Co.*, 260 N.E.2d 67 (Ill. App. 1970); *Heubusch* v. *Boone*, 213 Va. 414, 192 S.E.2d 783 (1972).

4. Finally, petitioner contends (Pet. 16-18, 21, 25) that the federal rule adopted by the court of appeals should not be applied in the circumstances of this case because the note was unsurious on its face and the FDIC therefore had actual

knowledge of its usurious nature. This fact-bound contention was correctly rejected by the court of appeals (Pet. App. 12-13) and does not warrant review.

The note indicated that interest would accrue at an annual rate of 15.21%. Such a note is not usurious on its face under Michigan law. Whether such a note is or is not usurious depends on whether the lender has secured a sworn statement that indicates that the loan is for a business purpose. An assignee who acquires a note with a 15.21% interest rate who is unaware of the fact that the required statement has not been filed, and who is entitled to holder in due course status under Michigan law, is not subject to a maker's usury defense. Mich. Comp. Laws Ann. § 438.5 (1978). Such a note becomes usurious only upon consideration of factors that are entirely independent of the note itself. The district court below found no evidence that the FDIC had actual knowledge of the fact that the note was usurious because of either the absence of a business purpose or the absence of a sworn statement concerning the business purpose (Pet. App. 18).

Petitioner contends that the FDIC should be deemed to have knowledge of everything in a failed bank's records, including the fact that a sworn statement concerning a business purpose was not contained therein. The courts have not placed such a burden on the FDIC, because to do so would significantly impair its ability to perform the "cost test" with the dispatch necessary to implement a purchase and assumption transaction. See Pet. App. 12-13. As the Sixth Circuit stated in *Gilman* v. *FDIC*, 660 F.2d at 695:

> To hold the FDIC responsible retroactively for the misdeeds of the predecessors of which it is ignorant when it agrees to repurchase all returned assets would hamper the FDIC's ability and inclination to opt for a Purchase and Assumption arrangement. The FDIC would never be able to enter one with a clear assessment of the amount of worthless paper and litigation it

might face. This dilemma would, in turn, frustrate the public policies behind the scheme of national banking insurance.

See also *FDIC* v. *Garbutt*, 370 N.W.2d at 392 (approving *Gilman* analysis).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Contrary to petitioner's assertion (Pet. 24-27), the intra-FDIC transfer of assets when it enters into a purchase and assumption transaction satisfies the "good faith" criterion. See *Gunter* v. *Hutcheson*, 674 F.2d at 873-874. Other federal courts have recognized that the FDIC may deal with itself in its dual capacities as receiver of a failed bank and as corporate insurer of bank deposits. *FDIC* v. *Godshall*, 558 F.2d 220 (4th Cir. 1977); *FDIC* v. *Glickman*, 450 F.2d 416 (9th Cir. 1971).